

**OFFICE OF THE GENERAL COUNSEL**  
**Division of Operations-Management**

**MEMORANDUM OM 04-26**

**February 12, 2004**

**TO:** All Regional Directors, Officers-In-Charge,  
and Resident Officers

**FROM:** Richard A. Siegel, Associate General Counsel

**SUBJECT:** Administrative Investigations vis-a-vis Hearings in Post-Election  
Proceedings

In Trimm Associates, Inc. v. NLRB, 351 F. 3d 99 (2003), the Third Circuit declined to enforce a certification based bargaining order because the Board resolved substantial and material factual issues in a post-election objections case without an evidentiary hearing. The Court, citing cases in the Second, Fifth and Ninth Circuits,<sup>1</sup> also noted that where, as in this case,<sup>2</sup> the election was close, greater scrutiny of the Board's decision, and in particular, the Board's decision not to hold a hearing was warranted. Trimm Associates Inc. v. NLRB, 351 F.3d at 103.

The Board also has remanded for hearing a number of post-election cases that had been administratively investigated at the Regional level. To date in FY 2004, the Board has remanded for hearing 7 of the 15 post-election cases the Board has considered in which objections were overruled based on an administrative investigation. As noted in the Representation Cases Best Practices Report, GC 98-1, Regions should avoid administrative investigations where they are likely to be lengthy or where it appears that the administrative investigation is not going to resolve all issues. The Report also emphasizes that "the view in the particular circuit court of resolving such matters administratively, rather than after a hearing, is an important consideration in determining whether to proceed to a hearing. Thus it is preferable to err on the side of proceeding to hearing rather than be told by a circuit court years later that it was inappropriate to resolve the issues administratively." (See Representation Cases Best Practices Report, pp. 23-24). See also Sections 11361.1 and 11391.1 of the Representation Casehandling Manual, which provide general instructions for processing of post-election matters in this regard.

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<sup>1</sup> NLRB v. Valley Bakery, Inc., 1 F.3d 769, 773 (9<sup>th</sup> Cir. 1993); NLRB v. Gooch Packing Co., 457 F.2d 361, 362 (5<sup>th</sup> Cir. 1972) and NLRB v. J-Wood/A Tappan Div., 720 F. 2d 309, 310 (3d. Cir. 1983) citing NLRB v. Bristol Spring Mfg. Co., 579 F.2d 704, 707 (2d Cir. 1978).

<sup>2</sup> The tally was 4-3 in favor of the Union.

In light of Trimm Associates as well as the Board's recent remand rate in these cases, it is essential that Regional Directors be especially sensitive to the risks of resolving post-election matters administratively.

If you have any questions about this memorandum, please contact your AGC, Deputy or the undersigned.

/s/  
R.A.S.

cc: NLRBU  
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